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No. 08-08-819

In The

Supreme Court of the United States

BERNADINE VAUGHN,

Petitioner,

v.

EPWORTH VILLA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK HAMMONS, SR.
HAMMONS, GOWENS & ASSOCIATES
325 Dean A. McGee Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-6100
Counsel of Record
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Must a plaintiff present "direct evidence" of retaliation in order to obtain a mixed-motive instruction in a Title VII retaliation case?[1]

2. What quantity or quality of circumstantial evidence is necessary to satisfy the burden-shifting requirements for a Title VII retaliation case?

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[1] This Court has granted certiorari to answer this question on a broader scale in *Gross v. FBL Financial Services*, 77 U.S.L.W. 3344, 2008 U.S. LEXIS 8885 (U.S. Dec. 5, 2008). Petitioner proposes that, as to this question, the Court hold this case pending determination of the *Gross* decision.

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Bernadine Vaughn respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on August 19, 2008.

OPINIONS BELOW

The August 19, 2008, opinion of the court of appeals is reported at 537 F.3d 1147 (10th Cir. 2008), and is set out at pp. 1-17 of the Appendix. The September 26, 2008, order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 32 of the Appendix. The October 17, 2006 order of the district court, which is not officially reported, is set out at pp. 18-31 of the Appendix.

STATEMENTS OF JURISDICTION

The decision of the court of appeals was entered on August 19, 2008. A timely petition for rehearing en banc was denied on September 26, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 704 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), this Court held that in a Title VII case if an employee shows the presence of discrimination in an employment decision, the burden of proof shifts to the employer to show that, notwithstanding the discriminatory motive, the employee would have been terminated for legitimate, nondiscriminatory reasons. "The court was divided, however, over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense." *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 93 (2003). *Desert Palace* did not answer that question, but limited its analysis to whether 42 U.S.C. § 2000e-2m required "direct evidence" in a Sec. 703 mixed-motive claim.

Further, *Desert Palace* did not answer the question of whether "direct evidence" would be required for Sec. 704 Title VII cases. The Tenth Circuit appears to take the position that *Desert Palace* applies only to mixed-motive cases under Sec. 703 of

Title VII and does not affect the Circuit's precedent as to retaliation claims under Sec. 704 although it does reverse the Circuit's precedent as to Sec. 703 claims. *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1227 n. 6 (10th Cir. 2008). Whether the direct evidence is required in non-Sec. 703 claims is presently pending before this Court in *Gross v. FBL Fin. Servs.*, 77 U.S.L.W. 3344, 2008 U.S. LEXIS 8885 (U.S. Dec. 5, 2008). If the direct evidence standard is generally rejected, that ruling would directly impact the correctness of the Circuit's holding in *Vaughn*. Accordingly, this case should be held pending resolution of that question.

Whether "direct evidence" is or is not the standard, the question of what evidence is "direct" or otherwise sufficient to shift the burden of proof remains unresolved.

These two considerations apply directly to the facts of this case. Ms. Vaughn was an employee of Epworth Villa, an assisted care living center. Ms. Vaughn filed a charge of race discrimination with the EEOC asserting that she had been treated differently from Caucasian employees, including being disciplined for certain medication charting errors for which her Caucasian counterparts were not disciplined.

During the pendency of the EEOC investigation, Ms. Vaughn found a medication chart lying in the copy room which she believed showed errors similar to ones for which she had been disciplined. The

Caucasian employees who committed the errors in the chart she found had not been disciplined. Ms. Vaughn copied pages from the chart and sent the pages to the EEOC in support of her claim of disparate treatment. App. 2-3.

After the EEOC concluded its investigation, a copy of the EEOC file was obtained by the Respondent who saw that Ms. Vaughn had copied pages of the medication chart and fired her for that reason. As set out in the Tenth Circuit's record:

> . . . On June 1, 2005, Epworth Villa terminated Vaughn's employment. A subsequent letter from Epworth Villa to the Department of Health indicated that Vaughn was '[t]erminated . . . for cause because she, without authorization and against policy and procedure, copied and removed from the property confidential document[s]; i.e. medical records of [an Epworth Villa resident] and staff pay records, then disclosed said records to a third party.'

Vaughn, 537 F.3d at 1149-1150, App. 4.

The "third party" was admittedly the EEOC.

At the district court level, Ms. Vaughn moved for partial summary judgment on the basis that the employer's explanation constituted an admission that it had retaliated against her for her participation in EEOC proceedings.[2] The district court denied that

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[2] For reasons that are unclear, the employer not only failed to plead but affirmatively disavowed the "same result" defense.

motion. The Respondent moved for summary judgment in part on the grounds that Ms. Vaughn's actions were not protected by the "participation clause" since the copying of pages was contrary to company policy and potentially a HIPAA violation. The trial court sustained summary judgment finding that Ms. Vaughn's actions did not constitute a protected activity; and therefore, no prima facie case was established. App. 4; 29-30. In a footnote, the trial court also indicated that Ms. Vaughn had not provided sufficient evidence to show that Respondent's actions were pretextual, but it did not address the argument that the admitted reason for termination constituted "direct" evidence of retaliation requiring a shifting of the burden of proof. App. 30 n. 6.

Ms. Vaughn appealed the summary judgment decision to the Tenth Circuit which reversed the district court's finding her actions were not protected by the "participation clause" of Title VII. Although finding her actions to be protected, the Tenth Circuit affirmed judgment on the alternative grounds that there was neither direct evidence nor pretext evidence that Ms. Vaughn's protected conduct motivated her termination. As to the direct evidence issue, the Tenth Circuit stated that:

> Under the *Price Waterhouse* framework, '[o]nce [a] plaintiff present[s] [direct] evidence that retaliation played a motivating part in defendant's decision to discharge him, it [becomes the] defendant's burden to prove by a preponderance that it 'would have made

the same decision' notwithstanding its retaliatory motive.' *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999). In arguing that direct evidence of retaliation exists in this case, Vaughn relies on Epworth Villa's assertion that it terminated her because she provided unredacted medical records to the EEOC. Based on this assertion, Vaughn contends that it was only because she provided the unredacted records to the EEOC,[3] rather than some other third party, that Epworth Villa terminated her. This proves too much.

'Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption.' *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 854 (10th Cir. 2007) (quotation omitted). 'A statement that can plausibly be interpreted two different ways – one discriminatory and the other benign – does not directly reflect illegal animus, and, thus, does not constitute direct evidence.' *Id.* at 855 (quotation omitted). And in this case, one can easily interpret Epworth Villa's statements benignly to mean that it

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[3] Though not necessary to the certiorari issue, this was not actually Petitioner's position. Petitioner contended that Respondent had admitted that the termination was based on her delivery of documents to the EEOC and that the only possible defense was to claim that the "same result" would have been reached if the documents had been supplied to some other entity than the EEOC. As stated, Respondent disavowed the "same result" defense.

> would have terminated Vaughn for intentionally disclosing unredacted medical records to any third party. After all, any such disclosure would have been contrary to the organization's policies and procedures, and ostensibly, the law. Accordingly, because Vaughn has not produced direct evidence of retaliation, the *Price Waterhouse* framework is inapplicable.

Vaughn v. Villa, 537 F.3d 1147, 1154-1155 (10th Cir. 2008). App. 15-16.

The Tenth Circuit then analyzed the evidence under the *McDonnell Douglas* formulation and found the evidence of pretext insufficient to warrant a jury trial. Thus, the Circuit affirmed the trial court's entry of summary judgment on an alternative ground.

Ms. Vaughn timely filed a petition for rehearing arguing that this expression effectively eliminated circumstantial evidence as a means for satisfying the *Price Waterhouse* standard; however, the Tenth Circuit denied the petition without opinion. App. 32.

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL-ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHAT EVIDENCE IS SUFFICIENT TO SHIFT THE BURDEN OF PROOF IN A TITLE VII RETALIATION CASE

This case represents an important legal issue which divided this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and which continues to divide the circuits following this Court's decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003). In *Desert Palace*, this Court summarized the division which plagued the Court in *Price Waterhouse*:

> . . . The Court was divided, however, over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense.
>
> Justice Brennan, writing for a plurality of four Justices, would have held that 'when a plaintiff . . . proves that her gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.' *Id.*, at 258 (emphasis added). The plurality did not, however, 'suggest a limitation on the possible ways of proving that [gender] stereotyping played a motivating role in an employment decision.' *Id.*, at 251-252.

> Justice White and Justice O'Connor both concurred in the judgment. Justice White would have held that the case was governed by *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), and would have shifted the burden to the employer only when a plaintiff 'showed that the unlawful motive was a *substantial* factor in the adverse employment action.' *Price Waterhouse, supra*, at 259. Justice O'Connor, like Justice White, would have required the plaintiff to show that an illegitimate consideration was a 'substantial factor' in the employment decision. 490 U.S., at 276. But, under Justice O'Connor's view, 'the burden on the issue of causation" would shift to the employer only where 'a disparate treatment plaintiff [could] show by *direct* evidence that an illegitimate criterion was a substantial factor in the decision.' *Ibid.* (emphasis added).

Id., at 93-94.

As observed in *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997), "it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent." Nonetheless, many circuits adopted a "direct evidence" standard in determining when to shift the burden of proof to an employer in the face of some evidence of discrimination.

The "direct evidence" standard itself turned out to be an uncertain rule. At least three schools of

thought developed as to the quantity and quality of evidence required to invoke burden-shifting under *Price Waterhouse*. These divergent positions were summarized in *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582-583 (1st Cir. 1999)[4] as:

> 1. The 'Classic' Position. Some courts adopt the traditional definition of 'direct evidence' for this purpose, holding that the term signifies evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence. *See, e.g., Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Haas v. Advo Sys., Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999); *EEOC v. Wiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996). Although only the Fifth and Tenth Circuits cling consistently to this view, other tribunals have embraced it periodically. *See, e.g., Carter v. Three Springs Resid'l Treatment*, 132 F.3d 635, 641 (11th Cir. 1998); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).
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> 2. The 'Animus Plus' Position. The Fourth Circuit, sitting en banc, recently defined 'direct evidence' for this purpose as evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly

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[4] A less complete discussion of the developing conflict is set out in *Thomas, supra*, 131 F.3d at 205.

the alleged discriminatory animus and (2) bear squarely on the contested employment decision. *See Taylor*, 193 F.3d at 232. The D.C. Circuit takes the same view. *See Thomas*, 131 F.3d at 204. The Ninth Circuit seems headed in this direction. *See Lambert v. Ackerley*, 180 F.3d 997, 1008-09 (9th Cir. 1999) (en banc), *cert. denied*, 120 S. Ct. 936, 145 L. Ed. 2d 814 (U.S. 2000). The Third Circuit at one time was in the 'animus plus' camp, *see Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), but that court is poised to revisit the question. *See Hankins v. City of Philadelphia*, 189 F.3d 353 (3d Cir. 1999), *rehearing en banc granted, opinion vacated*, 188 F.3d 217 (3d Cir. 1999). Two other courts of appeals have indicated occasional approval of this approach, *see, e.g., Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 436 (8th Cir. 1998), but as the cases cited herein indicate, both of these courts have flirted with other formulations. Courts endorsing the animus plus position do not distinguish between direct and circumstantial evidence in the classic sense but, rather, emphasize that the mixed-motive trigger depends on the strength of the plaintiff's case. *See, e.g., Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 553 (4th Cir. 1999) (emphasizing that whether a case falls under the mixed-motive or pretext rubric 'ultimately hinges on the strength of the evidence establishing discrimination') (citation and internal

quotation marks omitted); *Thomas*, 131 F.3d at 204 (similar).

3. The 'Animus' Position. A few courts resolve the direct evidence conundrum by the simple expedient of deleting the 'plus' from the 'animus plus' formulation. Those courts opine that as long as the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision. The Second Circuit advocates this position. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997); *Ostrowski*, 968 F.2d at 182. The Eighth Circuit intermittently takes this stance, *see, e.g., Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017-18 (8th Cir. 1999); *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993), and two other cases appear to fit somewhat loosely into this category, *see Wright v. Southland Corp.*, 187 F.3d 1287, 1303-04 (11th Cir. 1999); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1348-50 (7th Cir. 1995).

The "direct evidence" rule adopted by the Tenth Circuit represents the most extreme interpretation of this test. The Tenth Circuit allows for the use of circumstantial evidence as "direct evidence," *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1471 n. 5 (10th Cir. 1992). However, the Tenth Circuit has confined this use of circumstantial evidence to evidence which, though nominally circumstantial, permits *only one inference* – that of discrimination. Under the Tenth

Circuit's view, circumstantial evidence "that can plausibly be interpreted two different ways – one discriminatory and the other benign – does not directly reflect illegal animus, and, thus, does not constitute direct evidence," *Vaughn v. Villa*, 537 F.3d 1147, 1154-1155 (10th Cir. 2008) (App. 16), and will not invoke the mixed-motive doctrine.

This extreme position has been expressly criticized by other circuits as being inconsistent with Justice O'Connor's own reasoning:

> In our view, Justice O'Connor's invocation of 'direct' evidence is not intended to disqualify circumstantial evidence nor to require that the evidence signify without inference. In context, the notion of 'direct' evidence in Justice O'Connor's concurrence means only that the evidence marshaled in support of the substantiality of the discriminatory motive must actually relate to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace. Indeed, Justice O'Connor relies on circumstantial evidence in Price Waterhouse to show that the employer's discriminatory motive played a substantial role in the disputed employment decision. The decisionmakers who denied Ann Hopkins a partnership never admitted or stated expressly that the action was based on her gender. Rather, the Court cites gender-related, stereotyping evaluations and comments made by some partners

> as suggesting to the factfinder that gender played a role in the denial. *See* 490 U.S. at 235-37.

Thomas, supra, 131 F.3d at 204. Thus, the District of Columbia Circuit "believe[s] that the few circuits [citing to the Fifth, Tenth and Eleventh Circuits] that have taken Justice O'Connor's use of the word 'direct' to mean non-inferential or non-circumstantial have misread her concurring opinion and misconstrued the rule of law to be drawn from *Price Waterhouse*." *Id.*, at 205.

Clearly, the Tenth Circuit's holding has the practical consequence of writing circumstantial evidence out of the *Price Waterhouse* analysis, because only in rare cases will evidence both be circumstantial and yet allow the drawing of no inference other than discrimination or retaliation.

The conflict that arose – and continues to exist – regarding the meaning of "direct evidence" similarly infects determination of what constitutes a "motivating" factor in Sec. 703 claims governed by 42 U.S.C. § 2000e-2m's mixed-motive provisions.

The Seventh Circuit has adopted a unified standard governing both Sec. 703 discrimination and 704 retaliation claims. In contrast to the restrictive doctrines adopted in the Tenth Circuit and, to a lesser degree in the District of Columbia, Fourth Circuit and Eighth Circuit, the Seventh Circuit allows use of essentially any form of circumstantial evidence to show that discrimination or retaliation was a

motivating factor sufficient to shift the burden of proof. *See Sylvester v. SOS Children's Villages Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006):[5]

> A residual suspicion of circumstantial evidence in discrimination (including retaliation) cases is perhaps reflected in the frequent references in decisions of this court to 'a convincing mosaic of circumstantial evidence' as an alternative 'direct' method to direct evidence of establishing the prima facie case. . . . The phrase first appeared in *Troupe v. May Dep't. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994), where it was used, innocently enough, to describe the 'kind of circumstantial evidence . . . that consists of ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence none conclusive in itself but together composing a convincing mosaic

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[5] *Sylvester* cautioned that its prior decision in *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994) was not intended to impose a higher evidentiary burden on those who used circumstantial evidence. Thus, it rejected the notion that circumstantial evidence required a greater quantum of evidence:

> But it was not the intention in *Troupe* to promulgate a new standard, whereby circumstantial evidence in a discrimination or retaliation case must, if it is to preclude summary judgment for the defendant, have a mosaic-like character. There is no rich mosaic of circumstantial evidence of retaliation in this case, but there is enough (though maybe barely enough) to preclude summary judgment.

Id., 453 F.3d 904.

> of discrimination against the plaintiff.' A mosaic is a work of visual art composed of a large number of tiny tiles that fit smoothly with each other, a little like a crossword puzzle. A case of discrimination can likewise be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: 'a number of weak proofs can add up to a strong proof.' *Mataya v. Kingston*, 371 F.3d 353, 358 (7th Cir. 2004).

The Eighth Circuit imposes a higher standard focusing on both the strength of the proof and a specific link to the challenged action. The Eighth Circuit in *Richardson v. Sugg*, 448 F.3d 1046, 1058 (8th Cir. 2006) has explained its test as follows:

> . . . In the context of determining whether the evidence warrants an application of a mixed-motive analysis, '"direct" refers to the *causal strength of the proof*, not whether it is 'circumstantial' evidence.' *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (emphasis added). With that in mind, we find no error in the district court's evaluation.
>
> In order to merit a mixed-motive inquiry, the plaintiff must show a '"specific link between the discriminatory animus and the challenged [employment] decision."' *Philipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 673

> (8th Cir. 1995) (quoting *Stacks* [*v. Southwestern Bell Yellow Pages*], 996 F.2d [200] at 201. n. 1 [(8th Cir. 1993)].

Slightly less rigorous is the approach of the District of Columbia Circuit (adopted from the Fourth Circuit) which omits the requirement of a "specific link" to the employment action:

> . . . [T]he decision to shift the burden of persuasion properly rests upon the strength of the plaintiff's evidence of discrimination, not the contingent methods by which that evidence is adduced. Such a distinction is incompatible with both the facts and the logic of *Price Waterhouse*.
>
> Burden-shifting under *Price Waterhouse* requires 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.' *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). This formulation should be read carefully; evidence may 'bear directly' on a decision without referring to it specifically. Nonetheless the quotation from *Fuller* correctly clarifies that 'direct' describes a relationship between proof and incidents and not a characterization of the proof itself.

Thomas, supra, 131 F.3d at 204.

Both the Sixth Circuit and the Ninth Circuit have expressed confusion as to whether their standards

allow burden-shifting by ordinary circumstantial evidence or whether special standards are required.

In *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 525-526 (6th Cir. 2007), the Sixth Circuit noted confusion about when discriminatory remarks would suffice to shift the burden of proof:

> In *Rowan* [*v. Lockheed Martin Energy Sys.*, 360 F.3d 544 (6th Cir. 2004)], we held that when managers make age-biased statements outside the context of the decision to discharge the plaintiff, the statements are not direct evidence of age discrimination. *Rowan*, 360 F.3d at 550. We explained, 'Since the plaintiffs do not allege that they were made in relation to the decision to discharge the plaintiffs as part of the reduction in force, an inference is required that [age] bias may have played a role in the decision to select these plaintiffs.' *Id.* This analysis comports with the definition of direct evidence. It is also consistent with our opinions requiring some degree of connection between the comments and the relevant decision if the comments are to be considered even as circumstantial evidence of discrimination. *See, e.g., Smith v. Leggett Wire Co.*, 220 F.3d 752, 759 (6th Cir. 2000) (statements by non-decision makers insufficient to establish pretext as circumstantial evidence); *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir. 1998) (same); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998) (noting that isolated and

> ambiguous comments are too abstract to be considered as circumstantial evidence of discrimination in pretext analysis).
>
> We note, however, that there exists some tension in the law of this circuit. In *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241 (6th Cir. 1995), we held that racist comments by the plaintiff's managers 'constitute[d] direct evidence that plaintiff's termination may have been racially motivated,' notwithstanding that the comments were temporally removed from the termination decision and did not address the plaintiff in particular. *Id.* at 1249. Similarly, in *DiCarlo*, a supervisor told an Italian-American employee that there were too many 'dirty wops' working at the facility; about two weeks later, the supervisor terminated the employee. *DiCarlo*, 358 F.3d at 412-13. Because the slurs were uttered by an individual with decision-making authority regarding the plaintiff's job, we held that these statements were direct evidence of national-origin discrimination. *Id.* at 416.

The Sixth Circuit observed that "we see no principled reason for concluding that race-based and national-origin-based slurs are such overpowering evidence of discrimination that no inference is necessary to connect the expressed discriminatory animus to the adverse employment action, but mocking an older employee's age is not," *id.*, at 526; however, it declined to resolve that conflict. It is possible – but not certain – that the Sixth Circuit has now taken a

broad view of the evidence available to invoke the mixed-motive doctrine. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) (Stating that the "burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim" but not addressing the conflicting authority discussed in *Blair*.).

The Ninth Circuit also recognized a split in its precedent regarding whether circumstantial evidence must be "specific and substantial" and case law indicating that no heightened evidentiary burden is required. "[S]everal of our cases decided after *Costa* repeat the *Godwin* [*v. Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998)] requirement that a plaintiff's circumstantial evidence of pretext must be 'specific' and 'substantial'[.]" *Id.*, at 1030. On the other hand *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) held that "very little [] evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact-finder." (Quoting *Schnidrig v. Columbia Mach.*, 80 F.3d 1406, 1408 (9th Cir. 1996)). The Ninth Circuit did not resolve this conflict noting that in the case before it the employee's "evidence is sufficient to create a genuine issue of material fact regarding the motives for his demotion under either the *Godwin* standard which

would require 'specific' and 'substantial' circumstantial evidence of pretext, or the *McGinest* standard, which would not." *Id.*, at 1031.

What is clear is that there is pervasive and substantial disagreement between the circuits on essentially every aspect of both the "direct evidence rule" (assuming one exists) and the quantity and quality of circumstantial evidence which will suffice to shift the burden of proof to an employer in a retaliation case.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTION PRESENTED

The question presented here has the same or greater practical importance for litigants as the question presented in *Desert Palace* as well as in the case of *Gross v. FBL Fin. Servs.*, 77 U.S.L.W. 3344, 2008 U.S. LEXIS 8885 (U.S. Dec. 5, 2008) wherein this Court has granted certiorari to determine whether the *Desert Palace* formulation applies outside of Sec. 703 of Title VII.

This case offers an excellent vehicle for resolving the conflict. The Tenth Circuit has adopted a bright-line rule unfettered by caveats and qualifications. As a result, the challenged rule – which lies at the extreme end of the spectrum of case law – lends itself to straightforward and clear cut legal analysis facilitating the clarification necessary in this important area of substantive law.

III. AT THE LEAST THIS CASE SHOULD BE HELD PENDING THIS COURT'S DECISION IN *GROSS V. FBL FINANCIAL SERVICES*

This Court has granted certiorari in *Gross v. FBL Fin. Servs.*, 77 U.S.L.W. 3344, 2008 U.S. LEXIS 8885 (U.S. Dec. 5, 2008) in order to determine the extent to which direct evidence is required outside of Title VII Sec. 703 discrimination claims. Because the Tenth Circuit has held that the "direct evidence" continues to govern Sec. 704 retaliation claims, the *Gross* decision will directly impact the foundation of the Tenth Circuit's decision as to Petitioner's claims.

Thus, at the least, this case should be held pending disposition of *Gross* so that the Petitioner's claim will be determined under a correct standard.

CONCLUSION

For the reasons set out above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

MARK HAMMONS, SR.
HAMMONS, GOWENS & ASSOCIATES
325 Dean A. McGee Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-6100

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BERNADINE R. VAUGHN, Plaintiff-Appellant, v. EPWORTH VILLA, Defendant-Appellee.	No. 07-6005

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-04-1433-F)

(Filed Aug. 19, 2008)

Mark Hammons (Tamara Gowens with him on the briefs), Hammons, Gowens & Associates, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Gayle Barrett (Adam W. Childers with her on the brief), Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, for Defendant-Appellee.

Before **KELLY**, **EBEL**, and **McCONNELL**, Circuit Judges.

EBEL, Circuit Judge.

Plaintiff-Appellant Bernadine R. Vaughn ("Vaughn") appeals the district court's grant of summary judgment in favor of Defendant-Appellee Epworth Villa. At issue is Vaughn's allegation that she was retaliated against by Epworth Villa for participating in the Equal Employment Opportunity Commission ("EEOC") process. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

Vaughn was employed by Epworth Villa as a Certified Nurses Aid/Certified Medication Aid from 1991 until 2005. "Epworth Villa is a not-for-profit, continuing care retirement community related to the Oklahoma Conference of the United Methodist Church."

On April 28, 2004, Vaughn alleged that Epworth Villa discriminated against her and filed a complaint to this effect with the EEOC. According to Vaughn's complaint, she was discriminated against because of her age (49) and her race (black). Vaughn alleged that this discrimination occurred when she was disciplined for making errors with respect to a patient's medical records, while a younger, white employee was not disciplined for making the same errors.

At some point after filing her complaint with the EEOC, Vaughn provided the EEOC with several

pages of unredacted medical records concerning an Epworth Villa patient. These records included a "medication sheet," which detailed the patient's medication regimen, and "an individual patient's narcotics record," which detailed the patient's medication schedule. Vaughn provided these records to the EEOC believing they would bolster her discrimination claims. To that end, Vaughn asserted that the records contained errors similar to those for which she had been disciplined, but because the errors were committed by a younger, white employee, that employee had not been disciplined for the same conduct.

On May 23, 2005, over a year after Vaughn had filed her charge of discrimination with the EEOC (which remained pending), Epworth Villa learned about Vaughn's disclosure of the unredacted medical records. Shortly thereafter, Epworth Villa reported the incident to the Oklahoma Department of Health, which advised Epworth Villa to open an investigation into the matter.[1] Vaughn ultimately admitted that she copied and released the unredacted medical records and that one of her responsibilities at Epworth Villa was "practic[ing] confidentiality concerning residents' records, care and activities."

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[1] Epworth Villa reported the incident to the Oklahoma Department of Health pursuant to § 310:677-1-4(a) of the Oklahoma Administrative Code, which provides that "[a]n employer shall report to the Department any allegation of . . . misappropriation of client's or resident's property against the employer's nurse aide."

On June 1, 2005, Epworth Villa terminated Vaughn's employment. A subsequent letter from Epworth Villa to the Department of Health indicated that Vaughn was "[t]erminated . . . for cause because she, without authorization and against policy and procedure, copied and removed from the property confidential document[s]; i.e. medical records of [an Epworth Villa resident] and staff pay records, then disclosed said records to a third party."

Following Vaughn's termination, the Department of Health also investigated Vaughn's conduct. After a hearing on the matter, an Administrative Law Judge concluded that Vaughn "violated [Oklahoma] law when she copied [the] records, in essence taking the information, which is a property right, without permission, and therefore is guilty of the act of misappropriation of property belonging to a Resident." An annotation to this effect was made in Vaughn's official record with the Oklahoma Nurse's Aide Registry.

In response to her termination, Vaughn filed suit against Epworth Villa, asserting among other actions that she was terminated in retaliation for her participation in the EEOC process. The district court granted Epworth Villa's motion for summary judgment with respect to Vaughn's retaliation claim. In doing so, the district court concluded that Vaughn had failed to establish a prima facie case of retaliation. The court also noted, however, that even if Vaughn had established a prima facie case of retaliation, she had not established that Epworth Villa's purported non-retaliatory reason for terminating her

was pretextual. At Vaughn's request, the district court thereafter dismissed with prejudice her remaining causes of her action, thus resulting in a final judgment for purposes of appeal. Vaughn now appeals the district court's dismissal of her retaliation claim.

II. DISCUSSION

A. Standard of Review

"This court reviews the district court's summary judgment decision *de novo,* viewing the evidence in the light most favorable to the non-moving party; in this case, in [Vaughn's] favor." *Herrera v. Lufkin Indus., Inc.,* 474 F.3d 675, 679-80 (10th Cir. 2007). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Finally, we may affirm on any basis supported by the record, even though not relied on by the district court." *Seegmiller v. LaVerkin City,* 528 F.3d 762, 766 (10th Cir. 2008).

B. Title VII Retaliation

"In analyzing retaliation claims, we apply the three-part test established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)." *Somoza v. Univ. of Denver,* 513 F.3d 1206, 1211 (10th Cir. 2008). Pursuant to this test, Vaughn "bears the initial burden of establishing a prima facie case of retaliation." *Metzler*

v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1170 (10th Cir. 2006). If Vaughn meets this burden, then Epworth Villa "must offer a legitimate, non-retaliatory reason for [its] employment action" against Vaughn. *Id.* Should Epworth Villa satisfy this burden, Vaughn "bears the ultimate burden of demonstrating that [Epworth Villa's] proffered reason is pretextual." *Id.*

1. Prima Facie Case of Retaliation

To establish a prima facie case of retaliation, Vaughn "must show that: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action." *Timmerman v. U.S. Bank, N.A.,* 483 F.3d 1106, 1123-24 (10th Cir. 2007) (quotation omitted). In this case, it is undisputed that Vaughn suffered an adverse employment action: she was terminated. *See, e.g., Fye v. Okla. Corp. Comm'n,* 516 F.3d 1217, 1228 (10th Cir. 2008) (stating "termination . . . is clearly an adverse employment action."). Similarly, it is undisputed that Epworth Villa premised Vaughn's termination on her disclosure of the unredacted medical records to the EEOC. Thus, in determining whether Vaughn has established a prima facie case of retaliation, this court need only consider whether Vaughn's disclosure of the unredacted medical records was a protected activity.

The district court concluded that Vaughn did not engage in a protected activity when she supplied the unredacted medical records to the EEOC. In reaching this conclusion, the district court used a "rebuttable presumption" test. Under this test, the court reasoned that an employee's "dishonest or disloyal conduct" while participating in a Title VII proceeding was presumptively unreasonable and an unprotected activity unless the employee had no other reasonable choice in order to advance the EEOC claim. Thus, in this case, the court specifically considered whether Vaughn had no other choice but to submit "a patient's confidential personal health information . . . to the EEOC." The district court answered this question negatively, concluding that a variety of more sensible choices were available to Vaughn: "Plaintiff could have easily redacted the patient's name from the records. She could have obtained the patient's consent. Plaintiff could have simply prepared an affidavit attesting to what she believed were charting errors by other employees and defendant's failure to discipline those employees." With these potential alternatives in mind, the district court concluded "as a matter of law that [Vaughn's] copying and disclosure of the confidential personal health information in defendant's records was not 'protected activity.'" We disagree with the district court's utilization of this analysis under the participation clause.

"Protected activities fall into two distinct categories: participation or opposition." *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir.

1998). The "participation clause" provides that an employer may not retaliate against an employee "because [the employee] has . . . *participated in any manner* in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C.A. § 2000e-3(a) (§ 704(a)) (emphasis added). "The participation clause is designed to ensure that Title VII protections are not undermined by retaliation against employees who use the Title VII process to protect their rights." *Brower v. Runyon,* 178 F.3d 1002, 1006 (8th Cir. 1999).

The "opposition clause," meanwhile, provides that an employer may not retaliate against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII. 42 U.S.C.A. § 2000e-3(a).

> The distinction between participation clause protection and opposition clause protection is significant because the scope of protection is different. Activities under the participation clause are essential to the machinery set up by Title VII. As such, the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause.

Laughlin, 149 F.3d at 259 n.4 (citations, quotations omitted). In this case, there appears to be no dispute that Vaughn's conduct should be assessed in accordance with the participation clause, as the conduct at issue – her provision of the unredacted medical records to the EEOC – occurred subsequent to the

time she filed her Title VII complaint and was rooted in her Title VII participation.

This court has not yet interpreted the scope of the participation clause vis-à-vis the opposition clause. Nevertheless, a variety of our sister circuits have considered the matter, and to this end, the Third Circuit recently stated:

> Courts that have interpreted the "participation clause" have held that it offers much broader protection to Title VII employees than does the "opposition clause." *See, e.g., Deravin v. Kerik,* 335 F.3d 195, 203 (2d Cir. 2003) ("[C]ourts have consistently recognized [that] the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations."); *Booker v. Brown & Williamson Tobacco Co.,* 879 F.2d 1304, 1312 (6th Cir. 1989) (noting that "courts have generally granted less protection for opposition than for participation" and that the participation clause offers "exceptionally broad protection"); *Sias v. City Demonstration Agency,* 588 F.2d 692, 695 (9th Cir. 1978) (stating that the opposition clause serves "a more limited purpose" and is narrower than the participation clause); *Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, 1006 n.18 (5th Cir. 1969) (noting that the participation clause provides "exceptionally broad" protection for employees covered by Title VII).

Slagle v. County of Clarion, 435 F.3d 262, 266 (3d Cir. 2006). Based on the participation clause's plain

language, we believe the broad coverage afforded to the clause by these courts is well founded.

"When interpreting the language of a statute, the starting point is always the language of the statute itself. If the language is clear and unambiguous, the plain meaning of the statute controls." *McGraw v. Barnhart,* 450 F.3d 493, 498 (10th Cir. 2006) (quotations omitted). In this case, the participation clause plainly provides that individuals may not be retaliated against when they "participate[ ] in *any manner* in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000e-3(a) (emphasis added). We fail to see how this language places the kind of obligation on the employee that the district court here imposed – the obligation to resort only to honest and loyal conduct in advancing a claim unless the employee proves that it is necessary to resort to other means.[2] *See Deravin v. Kerik,* 335 F.3d 195 (2d Cir. 2003). There, the Second Circuit noted that "'[r]ead naturally, the word 'any' has an expansive meaning,' and thus, so long as 'Congress did not add any language limiting the breadth of that word,' the term 'any' must be given literal effect." *Id.* at 204 (quoting *United States v. Gonzales,* 520 U.S. 1, 5 (1997)).

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[2] We have no occasion in this case to consider whether the participation clause would protect an employee whose participation in a Title VII proceeding is a sham or is fraudulent before the hearing officer. That situation is not before us and we express no opinion on whether the participation clause would protect such conduct – that is, whether "fraud on the court" should truly be considered "participation."

Accordingly, given the plain language of the participation clause, we must conclude that Vaughn engaged in a "protected activity" when she submitted the unredacted medical records to the EEOC.[3]

2. Legitimate, Non-Retaliatory Reason

Having concluded that Vaughn established a prima facie case of retaliation, we must next consider whether Epworth Villa can provide a legitimate and facially non-retaliatory reason for its decision to terminate Vaughn. Epworth Villa asserts that it terminated Vaughn because she violated the organization's policies and procedures regarding confidentiality when without authorization, she provided the unredacted medical records to the EEOC.[4] Vaughn

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[3] Although the participation clause may be nearly absolute in theory, it may seldom be absolute in fact. When an employee violates an employer's policies, or for that matter the law, it will often be the case that the employer can assert a legitimate, non-retaliatory reason for taking an adverse employment action against the employee. And unless the employee can show that this reason was a pretext for retaliation, the employee will fail to meet her burden under the *McDonnell Douglas* burden shifting framework. Indeed, such a circumstance occurs in this case.

[4] In addition to violating Epworth Villa's policies and procedures, and perhaps Oklahoma law, it also appears that Vaughn's conduct may have violated federal law. Under the terms of the federal Health Insurance Portability Accountability Act ("HIPAA"), "[a] covered entity may not use or disclose protected health information, except as permitted or required by this subpart." 45 C.F.R. § 164.502(a). "Protected health information" includes "individually identifiable health information" that is "[t]ransmitted or maintained in any . . . form or medium." 45

(Continued on following page)

does not appear to dispute that she committed such a violation and her brief cannot be readily interpreted to challenge the notion that such a violation would constitute a legitimate and facially non-retaliatory reason for her termination. Instead, Vaughn appears to argue that Epworth Villa's reasoning was pretextual.

3. Pretext

Vaughn may show pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-[retaliatory]

C.F.R. § 160.103. "Individually identifiable health information," meanwhile, "[i]s created or received by a health care provider . . . ; and . . . [r]elates to the past, present, or future physical or mental health or condition of an individual . . . and . . . identifies the individual. . . ." *Id.*

Vaughn does not appear to dispute that the medical information she transmitted to the EEOC was "protected health information" or that Epworth Villa is a "covered entity." Instead, Vaughn contends that her conduct was excepted from HIPAA under 45 C.F.R. § 164.502(j), the whistleblower exception. This argument in unavailing for several reasons. Most basically, however, the whistleblower exception only applies to disclosures made to "a health oversight agency or public health authority," or "[a]n attorney retained by or on behalf of the" whistleblower, none of which is the EEOC. *Id.*

reasons." *Rivera v. City & County of Denver,* 365 F.3d 912, 925 (10th Cir. 2004). In an effort to make this showing, Vaughn's initial brief may be construed to make the following arguments: (1) Epworth was not required to terminate Vaughn for her disclosure of the unredacted medical records, (2) Epworth Villa had difficulties managing its records, and (3) a fellow employee engaged in similar – though admittedly not identical – conduct and was not terminated.[5] Each of these arguments is unavailing.

Unless Vaughn can show that other Epworth Villa employees were not terminated for engaging in the same or similar conduct – intentionally disclosing unredacted medical records to a third party – the fact that Epworth Villa was not required to terminate Vaughn does not give rise to an inference of pretext. In the absence of any evidence that similarly situated employees were treated differently, it is perfectly plausible that Epworth Villa would terminate Vaughn – whether it was required to or not – for intentionally

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[5] Additionally, Vaughn asserts for the first time in her reply brief that the following circumstances are indicative of pretext: (1) there was a close temporal proximity between Epworth Villa's discovery of Vaughn's disclosure of the unredacted medical records and her termination, (2) Epworth Villa was angry about Vaughn's conduct, and (3) Epworth Villa made allegedly inconsistent statements regarding Vaughn's termination. "This court does not ordinarily review issues raised for the first time in a reply brief" and to the extent these allegations attempt to expand the arguments made in Vaughn's primary brief, we decline to consider them here. *Stump v. Gates,* 211 F.3d 527, 533 (10th Cir. 2000).

disclosing the unredacted medical records rather than for some retaliatory purpose. It also seems to be of no moment that Epworth Villa had difficulties managing its records. Perhaps aware of these weaknesses in her argument, Vaughn contends that another Epworth Villa employee was not terminated when she engaged in similar conduct.

Although this argument is curtly developed in Vaughn's brief, based on the record, it appears that an Epworth Villa employee named Julia Ann Carruth twice removed "activity monitor logs" from the Epworth Villa campus and was only reprimanded for her conduct. On one of these occasions, the activity monitor log was evidently lost, only to be found in Epworth Villa's parking lot. Rather than containing any sort of patient medical information, however, the activity monitor logs only indicated the activities an Epworth Villa resident participated in. Based on these circumstances, we agree with the district court that Carruth's conduct was not sufficiently similar to Vaughn's to warrant an inference of pretext.

Critically, Vaughn and Carruth differ significantly in their levels of culpability. While Carruth's conduct can generally be characterized as wrongly removing material from the Epworth Villa campus, Vaughn intentionally supplied unredacted medical records concerning an Epworth Villa patient to a third party. The egregiousness of Vaughn's conduct vis-à-vis Carruth's is demonstrated by the fact that Vaughn's conduct likely violated both state and federal law by disclosing confidential information to

a third party, while there is no indication that Carruth's conduct was similarly unlawful. Accordingly, it was not inconsistent for Epworth Villa to believe that a more severe punishment was warranted in Vaughn's case as compared to Carruth's.

Accordingly, Vaughn has not met her burden in showing that Epworth Villa's legitimate, non-retaliatory reason for terminating her was pretextual and therefore has failed to meet her burden under the *McDonnell Douglas* burden-shifting framework.

C. Direct Evidence of Retaliation

As a final matter, Vaughn contends that instead of the *McDonnell Douglas* framework, this case should be analyzed under the framework developed by the Supreme Court in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). We disagree.

Under the *Price Waterhouse* framework, "[o]nce [a] plaintiff present[s] [direct] evidence that retaliation played a motivating part in defendant's decision to discharge him, it [becomes the] defendant's burden to prove by a preponderance that it '*would* have made the same decision' notwithstanding its retaliatory motive." *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 550 (10th Cir. 1999). In arguing that direct evidence of retaliation exists in this case, Vaughn relies on Epworth Villa's assertion that it terminated her because she provided unredacted medical records to the EEOC. Based on this assertion, Vaughn contends that it was only because she provided the unredacted

records to the *EEOC,* rather than some other third party, that Epworth Villa terminated her. This proves too much.

"Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Hall v. U.S. Dep't of Labor,* 476 F.3d 847, 854 (10th Cir. 2007) (quotation omitted). "A statement that can plausibly be interpreted two different ways – one discriminatory and the other benign – does not directly reflect illegal animus, and, thus, does not constitute direct evidence." *Id.* at 855 (quotation omitted). And in this case, one can easily interpret Epworth Villa's statements benignly to mean that it would have terminated Vaughn for intentionally disclosing unredacted medical records to *any* third party.[6] After all, any such disclosure would have been contrary to the organization's policies and procedures, and ostensibly, the law. Accordingly, because Vaughn has not produced direct evidence of retaliation, the *Price Waterhouse* framework is inapplicable.

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[6] As previously indicated, Epworth Villa asserted to the Oklahoma Department of Health that Vaughn was "[t]erminated . . . for cause because she, without authorization and against policy and procedure, copied and removed from the property confidential document[s]; i.e. medical records of [an Epworth Villa resident] and staff pay records, *then disclosed said records to a third party.*"

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BERNADINE R. VAUGHN, Plaintiff,	)	
vs.	)	Case No. CIV-04-1433-F
EPWORTH VILLA, Defendant.	)	

ORDER

(Filed Oct. 17, 2006)

Before the court is defendant's motion for partial summary judgment. By this motion defendant seeks summary judgment on plaintiff's Title VII claim for a racially hostile work environment; on plaintiff's claims for discriminatory failure to promote her to two positions as time barred; and on plaintiff's Title VII retaliation and discrimination claims related to the termination of her employment.

Plaintiff has elected not to pursue her hostile work environment claim and agrees that defendant's motion directed to this claim may be granted. Accordingly, defendant's motion for summary judgment on plaintiff's racially hostile work environment claim is **GRANTED**.

Plaintiff agrees that her Title VII claim for discriminatory failure to promote her is time-barred, as defendant asserts. However, she asserts that her

claim for discriminatory failure to promote her to the position of physical therapy aide is not barred under 42 U.S.C. § 1981, which has a four-year statute of limitations. Defendant in reply correctly asserts that plaintiff's claim for failure to promote her to the position of ward clerk, even under § 1981, is time-barred inasmuch as the position was filled on February 24, 1999 and plaintiff's complaint was not filed until October 26, 2004. With respect to the physical therapy aide position, defendant in reply asserts that plaintiff cannot establish a *prima facie* case of discriminatory failure to promote under 42 U.S.C. § 1981 because she cannot show that the position remained open or was filled by a non-minority, inasmuch as it is undisputed that the physical therapy aide position plaintiff applied for and complains of not receiving was filled by an African American female, June Garrett, on September 17, 2002. To establish a *prima facie* case of discriminatory failure to promote, a plaintiff must show, *inter alia,* that the position remained open or was filled by a non-minority. *See McKenzie v. City and County of Denver,* 414 F.3d 1266, 1277 (10th Cir.2005); *Amro v. Boeing Co.,* 232 F.3d 790, 796 (10th Cir.2000); *Reynolds v. School District No. 1,* 69 F.3d 1523, 1534 (10th Cir. 1995). *See also Exum v. United States,* 389 F.3d 1130, 1134 (10th Cir.2004) (position remained open). Because plaintiff cannot establish that the physical therapy aide position for which she applied remained open or was filled by a non-minority, defendant is entitled to summary judgment on plaintiff's § 1981

claim for discriminatory failure to promote her to that position.

The Claims Relating to Defendant's Termination of Plaintiff – Discrimination and Retaliation

Discrimination. Defendant argues that plaintiff has failed to establish a *prima facie* case of Title VII discriminatory discharge relating to plaintiff's termination. While taking issue with defendant's formulation of a *prima facie* discriminatory discharge case, plaintiff states that she is not asserting a claim for discriminatory termination. *See* plaintiff's brief at p. 18 ("Even as a discrimination claim (which this is not). . . ."). Accordingly, defendant is entitled to summary judgment on plaintiff's discriminatory discharge claim, if any.

Retaliation. Plaintiff's asserts that defendant's reporting (to the Oklahoma Department of Health) of plaintiff's disclosure, to the EEOC, of confidential medical records without redaction or consent of the patient, amounted to retaliation for plaintiff's protected activity. Defendant argues that its actions did not constitute an "adverse employment action" because defendant was by law required to make such a report. Plaintiff argues, however, that defendant did not merely report plaintiff's copying and disclosure of patient records but attempted to influence the administrative process by filling an amicus brief and arguing that plaintiff's actions constituted misappropriation of patient property. She asserts that

defendant's actions were actions "which might have dissuaded a reasonable person from making or supporting a charge of discrimination." *Burlington Northern Santa Fe Ry. Co. v. White*, ___ U.S. ___, 126 S.Ct. 2405, 2416 (2006) (quoted in *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1202 n. 2 (10th Cir. 2006). The court disagrees.

A reasonable person would not consider the disclosure of confidential patient records without redaction or the patient's consent necessary to file or support a charge of discrimination. This is so, even in circumstances similar or identical to those now before the court, where the court assumes for present purposes that plaintiff believed the disclosure of these records showed that others who had made errors similar to one made by plaintiff were not similarly disciplined. Defendant's action was not an action which might have dissuaded a reasonable person from making or supporting a charge of discrimination. A reasonable person, feeling herself aggrieved by her employer's treatment of her, would not consider it necessary to commit a flagrant violation of the law and the employer's policy (e.g., the disclosure of unredacted patient information) in order to convey the relevant information to the EEOC. Moreover, even if defendant's action of reporting to the Department of Health plaintiff's copying and disclosure of confidential patient health information as misappropriation of patient property could be viewed as an action "which might have dissuaded a reasonable person from making or supporting a charge of

discrimination," it is undisputed that defendant was required by law to report plaintiff's misappropriation of patient property to the Department of Health. *See* Okla. Admin. Code 310:677-1-4(b). Accordingly, defendant had a legitimate, non-retaliatory reason for reporting plaintiff's conduct to the Department of Health. Nothing in *Burlington Northern* supports the notion that the "dissuasion" of the hypothetical reasonable worker will support a retaliation claim where that "dissuasion" is rooted in entirely reasonable and lawful – indeed legally compelled – action by the employer.

Plaintiff argues that defendant's purported legitimate, non-retaliatory reason is not legally sufficient because it is not unrelated to plaintiff's participation in protected activity, citing *inter alia*, *Sanchez v. Mora-San Miguel Electric Cooperation, Inc.*, 173 F.3d 864, 1999 WL 176151 at *3 (10th Cir. Mar. 31, 1999) (No. 98-2061) ("A legitimate, non-retaliatory reason is any reason or explanation unrelated to [plaintiff's] participation in protected activity.") However, defendant's reporting of plaintiff's copying and disclosure of a patient's medical records as misappropriation of patient property is logically and legally unrelated to plaintiff's protected activity of disclosing such records *to the EEOC* to support her charge of discrimination because defendant was required by law to report *any* misappropriation of patient property, *i.e.*, copying and disclosure of patient medical records to any third party. In other words, the fact that the disclosure was made to the

EEOC, rather than to some other third party, was irrelevant to the employer's decision and is irrelevant to this court's decision.

It is undisputed that plaintiff filed a charge of discrimination on April 28, 2004 and thereafter copied and submitted to the EEOC records containing confidential personal health information of one of defendant's patients. The record does not reveal when defendant learned that plaintiff had filed a charge of discrimination. However, defendant admits that on or about May 23, 2005, it became aware that plaintiff had disclosed confidential personal health information of a patient to the EEOC without patient consent and that defendant confirmed this on or about May 26, 2005, when it received plaintiff's EEOC file after submitting a Freedom of Information Act request and found the unredacted confidential personal health information of one of its patients in the materials submitted by the plaintiff to the EEOC. It is also undisputed that defendant terminated plaintiff's employment on June 1, 2005. It is undisputed that the reason given by defendant for its termination of plaintiff's employment, both at the time of her termination and in its motion for summary judgment, is that plaintiff copied and disclosed confidential patient medical record and disclosed them to a third party without prior authorization. *See* Notice of Employee Reprimand (Ex. 16 to defendant's brief) and deposition of Floyd Autin (Ex. 15 to defendant's brief) at p. 75. It is undisputed that plaintiff's disclosure of the confidential health information of one of defendant's

patients violated defendant's policies, its employee conduct and work rules and HIPAA[1] regulations. It is also undisputed that maintaining confidentiality concerning residents' records, care and activities was part of plaintiff's job description and that plaintiff understood that that was an obligation she had throughout her employment at Epworth Villa. Moreover, it is undisputed that plaintiff understood that every resident at Epworth Villa had a right to have his or her personal and medical care records kept confidential and that HIPAA required that personal medical records be kept confidential.

There is no evidence whatsoever before the court from which a causal connection between plaintiff's mere filing of her charge of discrimination, on April 28, 2004, and plaintiff's termination, on June 1, 2005, can be inferred. Hence, defendant is entitled to summary judgment on plaintiff's claim that her employment was terminated in retaliation for her filing an EEOC complaint.

Defendant argues that plaintiff's disclosure of confidential personal health information to the EEOC without patient consent is not "protected activity" as a matter of law, whether the court applies the "balancing test" utilized by some courts, citing, *e.g.*, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d

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[1] The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d, implemented by regulations found in 45 CFR Parts 160 and 164.

756, 763 (9th Cir. 1996); *Jefferies v. Harris County Community Action Assoc.*, 615 F.2d 1025, 1036-37 (5th Cir. 1980) and *Abernathy v. Walgreen Co.*, 836 F.Supp. 817, 820-21 (M.D. Fla. 1992), or the "rebuttable presumption standard" applied by one court, citing, *Laughlin v. Metro. Washington Airports Authority,* 952 F.Supp. 1129, 1136-39 (E.D. Va. 1997), *aff'd,* 149 F.3d 253 (4th Cir. 1998). Plaintiff argues that the cases cited by defendant are inapposite because they are "opposition clause" cases rather than "participation clause" cases and in any event do not carve out a *per se* exclusion for misappropriation of property or disclosure of an employer's confidential records. She also argues that she should not be deprived of the protected character of her acts because she innocently acquired the medical sheet, a copy of which was provided to the EEOC, inasmuch she found it lying on the copy machine; she made a copy because she believed it showed that others had committed charting errors similar to hers and not been disciplined; she did not redact information on the sheet because she was concerned that defendant might deny the authenticity of the medical sheet; the patient's family was never told of the disclosure; there is no evidence that defendant or the patient were harmed by the disclosure; and the EEOC by its regulations is prevented from disclosing any record it maintains except upon written request to the person to whom the record pertains or upon that person's prior written consent, with certain other limited exceptions. Additionally, plaintiff points out that another employee of defendant took patient

information off-site, lost it and lied about it, but despite this being a second offense, that employee was only reprimanded.

The Tenth Circuit has not addressed the issue of whether the misappropriation or disclosure of confidential documents may qualify as "protected activity" under either the "participation clause" or the "opposition clause." As defendant points out, a number of courts have done so, applying either a "balancing test" or a "rebuttable presumption standard."[2] Additionally, at least one court has, on policy grounds, adopted a *per se* rule excluding the misappropriation or copying and disclosure of an employee's personal records, even though innocently acquired, from "protected activity" for purposes of a state law claim for retaliatory discharge. *See Watkins v. Ford Motor Co.*, 2005 WL 3448036 at *6-8 (S.D. Ohio, Dec. 15, 2005) (No. C-1-03-033).[3] Upon review of these authorities,

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[2] In all of the cases cited by defendant, courts have addressed the issue where the misappropriation or disclosure was asserted to be protected opposition to employment discrimination. Neither of the parties have cited nor has the court located any case in which the misappropriation or disclosure was asserted to have been made to assist or participate in an investigation of employment discrimination or an employment discrimination proceeding.

[3] In adopting a *per se* rule, the court reasoned as follows:

> Accepting as true his allegations that he found the profiles in a book that had been left out in the open, the papers were not marked as confidential, and he disclosed the profiles only to his counsel, his conduct cannot reasonably be construed as protected activity.

(Continued on following page)

the court is persuaded by the reasoning of the United States District for the Eastern District of Virginia in *Laughlin v. Metropolitan Washington Airports Authority,* 952 F.Supp. 1129, 1134-1139 (E.D. Va. 1997), *aff'd* on other grounds, 149 F.3d 253, 260 (4th Cir. 1998)[4], that the most appropriate approach to determining when the misappropriation or copying and disclosure of an employer's confidential documents may constitute "protected activity" under either the opposition or participation clause[5] is the rebuttable

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> As noted by defendant, if the Court were to adopt plaintiff's argument that such conduct is protected activity "plaintiffs everywhere would be entitled under the umbrella of protected activity, to steal company information and, so long as they give the information to their lawyer, not only be able to avoid disciplinary action by their employer, but also be empowered to successfully maintain a claim against their employer if adverse action is taken for the misconduct."

Watkins v. Ford Motor Co., 2005 WL 3448036 at *7.

[4] The Fourth Circuit affirmed the district court based on its alternate analysis and conclusion employing the balancing test. In so doing, the Fourth Circuit stated that it "believe[d] that the Circuit's well-established balancing test provides an adequate, workable framework" and that it was "bound by the precedent established by another panel of this court." 149 F.3d at 260.

[5] Plaintiff is correct that all of the cases in which the issue of whether misappropriation or disclosure of confidential employer documents constitutes "protected activity" were "opposition" rather than "participation" cases. Moreover, it may well be that the protection afforded for participatory or assisting activity is broader than that for oppositional activity, *see Laughlin v. Metro Washington Airports Authority*, 149 F.3d 253, 259 n.4 (4th Cir. 1998), a proposition on which this court takes no position. However, there is no analytical reason not to employ

(Continued on following page)

presumption standard employed by that court. That standard both "appropriately encourages employees to first resort to the numerous lawful and honest avenues available" to oppose an unlawful employment practice and/or to assist or participate in an investigation of or proceeding involving an unlawful employment practice, and affords an employee an opportunity to overcome that presumption when "the employee has no choice but to resort to dishonest and disloyal conduct." *Laughlin v. Metropolitan Washington Airports Authority,* 952 F.Supp. at 1138. Applying this approach, plaintiff's conduct is presumed to be unprotected activity. Plaintiff has failed to and cannot overcome that presumption because she has not made and cannot make a specific showing that there existed no alternative to the disloyal and unlawful conduct of copying and submitting a patient's confidential personal health information in defendant's records to the EEOC. Plaintiff could have easily redacted the patient's name from the records. She could have obtained the patient's consent. Plaintiff could have simply prepared an affidavit attesting to what she believed were charting errors by other employees and defendant's failure to discipline those employees. Plaintiff's intentional disclosure of protected patient information invited precisely the action

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the same test in a participation case as in an opposition case for determining whether the misappropriation or disclosure of confidential employer documents should be considered "protected activity."

that the employer took – summary dismissal. The court accordingly concludes as a matter of law that plaintiff's copying and disclosure of the confidential personal health information in defendant's records was not "protected activity." No reasonable jury could find that plaintiff has overcome the rebuttable presumption that the conduct in question was unprotected. However, even if the court were to apply a balancing test similar to that employed in *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996) and *Jeffries v. Harris County Community Action Assoc.*, 615 F.2d 1025 (5th Cir. 1980), the result would be the same. While plaintiff had a legitimate interest in preserving evidence of defendant's unlawful employment practice, defendant's interest not only in maintaining a harmonious and efficient workplace but in ensuring that its employees did not violate the law and in maintaining the confidentiality of its patients' private health information outweighs plaintiff's interest, particularly where, as here, plaintiff could have preserved the evidence without violating the law and her employer's policy and trust, and the "evidence" does not even show or prove what plaintiff thought it did. *See* plaintiff's deposition (Ex. 2 to defendant's brief) at pp. 147-53.

Because plaintiff has failed to demonstrate that her copying and submittal of confidential patient health information in defendant's records to the EEOC was "protected activity," plaintiff cannot establish a *prima facie* case of retaliatory termination based on their conduct under either Title VII or 42

U.S.C. § 1981. *See O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248, 1257 (10th Cir. 2001); *Amro v. Boeing Co.*, 232 F.3d 790 (10th Cir. 2000); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098 (10th Cir. 1998).[6]

In accordance with the foregoing, defendant's motion for partial summary judgment (doc. no. 64) is **GRANTED**.

The claims which survive this order are plaintiff's discriminatory treatment race claims, alleging different treatment with respect to plaintiff's placement on a performance improvement plan, attendance at anger management training, discipline regarding attendance, and scheduling for weekend and holiday shifts.

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[6] Even though the lack of a *prima facie* case is dispositive here, it should be noted that plaintiff's pretext argument is disingenuous. Plaintiff argues that "another employee had a second offense of taking patient information off-campus, in fact taking an entire book, losing it and lying about it," Plaintiff's response, at 21, and suffered only a reprimand. This ignores the fact that the conduct of the other employee – misconduct though it was – did not involve any *intentional disclosure to a third person*. *See*, Exhibits 12 and 13 to Plaintiff's response, as well as the deposition of Floyd Autin, pp. 61-64 (Exhibit 4 to plaintiff's response). Moreover, plaintiff's argument that dismissal was not required by law, Response at 20, is a red herring. The fact that dismissal was not legally required does nothing to undermine the reasonableness, plainly shown in this record, of her summary dismissal.

DATED October 17, 2006.

/s/ S P Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BERNADINE R. VAUGHN,
Plaintiff-Appellant,
v.
EPWORTH VILLA,
Defendant-Appellee.

No. 07-6005

ORDER

(Filed Sep. 26, 2008)

Before **KELLY**, **EBEL**, and **MCCONNELL**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk